Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	WT Docket No. 19-250
	)	
Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling	)	RM-11849

REPLY COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association ("CCA")[1] submits these reply comments in response to the *Public Notice*[2] in the above-captioned proceedings regarding the petitions for declaratory rulings and petition for rulemaking filed by the Wireless Infrastructure Association ("WIA") and CTIA—The Wireless Association ("CTIA"). The record confirms the importance of the Commission issuing the relief that WIA and CTIA seek, and the Commission's authority to do so.

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[1] CCA is the nation's leading association for competitive wireless providers and stakeholders across the United States. CCA's membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

[2] *Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling*, Public Notice, 34 FCC Rcd. 8,099 (2019) ("*Public Notice*").

I. THE RECORD CONFIRMS THE NEED FOR CLEAR RULES THAT REFLECT MODERN DEPLOYMENT PRACTICES

The record establishes support for targeted relief that will streamline infrastructure deployment.[3]

First, there is strong support in the record for clarifying that a "deemed granted" approval under Section 1.6100(c)(4) means that an applicant can move forward with construction and has all permits or authorizations needed to proceed. AT&T, for example, explains that "[w]ithout such a clarification, a locality could effectively nullify the deemed grant by simply withholding some other permit from the applicant."[4] T-Mobile agrees and explains that this dynamic creates unnecessary and inefficient litigation, as well as undue delays as "applicants are forced to litigate to enforce their deemed granted rights."[5] WISPA and the Free State Foundation express similar support for the WIA and CTIA petitions.[6]

While municipal filers argue that this clarification will "threaten public safety"[7] and "mandate local governments allow" dangerous deployments,[8] these arguments are misplaced.

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3 *See* Comments of Competitive Carriers Association at 5, WT Docket No. 19-250, RM-11849 (filed Oct. 29, 2019) ("CCA Opening Comments").

4 Comments of AT&T at 15, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84 (filed Oct. 29, 2019) ("AT&T Comments").

5 Comments of T-Mobile USA, Inc. at 11-12, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84 (filed Oct. 29, 2019) ("T-Mobile Comments").

6 *See* Comments of the Wireless Internet Service Providers Association at 6, WT Docket No. 19-250, RM-11849 (filed Oct. 29, 2019) ("WISPA Comments"); Comments of the Free State Foundation at 3 & app. 3, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84 (filed Oct. 29, 2019).

7 Joint Comments of City of San Diego, Cal., et al. at 13, WT Docket No. 19-250, RM-11849, WT Docket No. 17-70, WC Docket No. 17-84 (filed Oct. 29, 2019) ("Joint Comments of Cities").

8 Comments of the National Association of Telecommunications Officers and Advisors, the United Conference of Mayors and the National Association of Counties at 5, WT Docket

The Commission made it clear in the *2014 Order* that "[s]tates and localities may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety."[9] What they may *not* do is use reviews related to these issues as a tool to circumvent the 60-day shot clock in the Commission's rules. Particularly for the relatively minor modifications covered by Section 6409(a), that timeframe is a reasonable one in which to conduct reviews. An approval under the Commission's rules, whether affirmatively by the municipality or by virtue of the deemed-granted remedy if the municipality fails to timely act, does not remove the municipality's ability to "enforce" its "generally applicable" codes and address public-safety issues.[10]

Joint comments from a number of cities even raise the specter of the Tenth Amendment, characterizing this proposed clarification as the Commission's "effectively approv[ing] *sub silentio* applications submitted to state or local governments."[11] The Commission has already rejected this argument in the context of Section 332, [12] and multiple courts have "readily conclude[d] that the FCC's 'deemed granted' procedure [under Section 6409(a)] comports with

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No. 19-250, RM-11849, WC Docket No. 17-84, WT Docket No. 17-79 (filed Oct. 29, 2019) ("NATOA et al. Comments").

9 *2014 Order* at 12,945 ¶ 188.

10 *Id.*

11 Joint Comments of Cities at 15-16.

12 *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9,088, 9,141 ¶ 101 (2018) ("*September 2018 Order*").

the Tenth Amendment."[13] This minor clarification to the Commission's rules simply "ensure[s] that collocation applications are not mired in the type of protracted approval processes that the Spectrum Act was designed to avoid"—a result "entirely permissible under our system of federalism."[14]

Second, the record strongly demonstrates the need for clarity regarding the meaning of "concealment elements" in Section 1.6100(b)(7)(v) and what kinds of modifications "defeat" them.[15] American Tower Corporation explains that "interpretation of the meaning of 'concealment element' has varied across the country."[16] Worse, as AT&T notes, "[a] number of localities have seized on this narrow exception to designate all kinds of modifications, such as changes in height, width, or equipment, as changes to concealment features."[17] Without clarification, this narrow "concealment exception would swallow the rule, nullifying the Section 6409(a) protections adopted by Congress."[18] Just like CCA, filers confirm that they have "encountered similar issues" to those WIA and CTIA identified in their petitions.[19]

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13 *Montgomery Cty. v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015); *see also ExteNet Systems, Inc. v. Village of Pelham*, 377 F. Supp. 3d 217, 223-27 (S.D.N.Y. 2019) (also rejecting Tenth Amendment challenge to Section 6409(a)).

14 *Montgomery Cty.*, 811 F.3d at 128-29.

15 47 C.F.R. § 1.6100(b)(7)(v).

16 Comments of American Tower Corporation at 9, WT Docket No. 19-250, RM-11849 (filed Oct. 29, 2019).

17 AT&T Comments at 6.

18 *Id.*; *see also* Comments of Crown Castle International Corp. at 9, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84 (filed Oct. 29, 2019) ("Crown Castle Comments") (identifying similar concerns and noting that "[w]hen there are divergent perspectives between a local government and an applicant" on this issue, the "applicant is effectively precluded from utilizing Section 6409").

19 T-Mobile Comments at 8; AT&T Comments at 8.

Unsurprisingly, municipalities and related filers oppose clarifying the rule as WIA and CTIA request, but their filings bring into sharp relief the lack of objective criteria in this area. For example, the joint comments from San Diego and other cities assert that "whether a modification defeats the concealment elements must properly address individual aspects of concealment in addition to the concealment context as a whole," and that the Commission should let municipalities "decide for themselves" what changes defeat concealment elements.[20] The National League of Cities similarly expresses a broad view that "numerous elements of siting review . . . contribute to concealment."[21] But such elaborate and highly subjective standards are inconsistent with the *2014 Order*, which repeatedly emphasized the need for objective standards to determine whether modifications fall within Section 6409(a)'s framework.[22] The Commission can and should bring significantly more clarity to this area by explaining that only elements identified as concealment elements qualify, that the size of facilities are addressed with objective standards elsewhere in the Commission's rules and cannot be imported here, and that changes must materially alter a site's appearance to defeat concealment elements.[23]

Third, the record shows the need for a rulemaking proceeding to modernize the Commission's rules regarding compound expansions. The Commission was right in 2014 to recognize the importance of collocation in encouraging wireless deployment and "safeguard[ing]

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[20] Joint Comments of Cities at 32-33.

[21] Comments of the National League of Cities, et al. at 16, WT Docket No. 19-250, WT RM-11849, WT Docket No. 17-79, WC Docket No. 17-84 (filed Oct. 29, 2019) ("National League of Cities Comments").

[22] *See*, *e.g.*, *2014 Order* at 12,944, 12,947, 12,951 ¶¶ 188, 194, 202.

[23] *See* CCA Opening Comments at 8.

environmental, aesthetic, historic, and local land-use values."[24] But the current rules—which treat as a *per se* substantial change any modification that requires *any* excavation outside the current site—discourage collocation because they do not reflect "the changes that have occurred in the intervening years" since the Commission first set out its rules.[25] Crown Castle rightly notes that change is needed "to realize the full benefit of encouraging collocation (the fundamental, underlying policy of Section 6409)."[26] That is particularly true as collocation becomes increasingly important for diverse services and business models, as comments from WISPA and ACT | The App Association demonstrate.[27]

Some municipal filers question the need for this change, arguing that even if minor expansions are not within the Section 6409(a) framework, they may be approved by municipal authorities nonetheless.[28] Perhaps they would be approved at some point—but perhaps not. That uncertainty undermines the purpose of Section 6409(a): encouraging collocation in a timely and efficient manner by providing certainty via a "shall approve" mandate for stakeholders. That lack of certainty is a serious roadblock to progress, as 5G will require extensive collocation on a scale beyond that of previous generations.

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[24] *2014 Order* at 12,868 ¶ 5.

[25] AT&T Comments at 30; *see also* WISPA Comments at 8 (the current rule "incorrectly assumes that collocations can be accomplished without the need for minor compound expansions" and updating the rule will "account for technological advancements and marketplace developments").

[26] Crown Castle Comments at 31.

[27] *See* WISPA Comments at 8; Comments of ACT | The App Association at 7-10, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84 (filed Oct. 29, 2019).

[28] *See* Joint Comments of Cities at 49.

Some filers also suggest that permitting minor compound expansions for eligible facilities requests will have "unpredictable and irrevocable" consequences, with "backup generators virtually in residential backyards or dangerously close to waterways."[29] However, as noted above, the Commission has already made clear that approvals under Section 6409(a) are subject to "generally applicable" codes with "objective standards reasonably related to health and safety."[30] Permitting minor expansions beyond the existing site will not change that conclusion, and concerns regarding facilities in the public rights-of-way are particularly misplaced given that WIA does not request that the Commission modify the definition of a site for "towers in the public rights-of-way."[31]

II. THE COMMISSION HAS AUTHORITY TO ISSUE THE REQUESTED RELIEF

Some municipalities and associated groups complain that the Commission has not provided a "fair opportunity for comment" on the petitions,[32] even to the point of alleging a "lack of due process.[33] But even those filers alone managed to submit comments spanning over a hundred pages, excluding those commenters' lengthy exhibits. These arguments lack merit, and the Commission should reject them.

Some of these filers argue that the Commission must "advance a clear proposal of its own," rather than seek comment on the WIA and CTIA petitions.[34] But with respect to

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29 NATOA et al. Comments at 15; *see also*, *e.g.*, Joint Comments of Cities at 52-53.

30 *2014 Order* at 12,945 ¶ 188.

31 47 C.F.R. § 1.6100(b)(6); *see* WIA Petition for Rulemaking, RM-11849, at 9-10 (filed Aug. 27, 2019).

32 National League of Cities Comments at 2.

33 Joint Comments of Cities at 1.

34 National League of Cities Comments at 2.

declaratory relief, the Commission's rules simply require a bureau to "seek comment on the petition via public notice,"[35] just as occurred here. And WIA's rulemaking petition expressly calls for "the Commission to commence a rulemaking proceeding to update its rules"[36]—the Commission can grant that relief by issuing a notice of proposed rulemaking describing any actions it is considering.

Other filers contend that the Commission cannot clarify its rules or commence a rulemaking because the filers either disagree with the examples of deployment obstacles WIA and CTIA identify or believe that those examples lack sufficient specificity.[37] That argument is also unpersuasive, as the petitions do not seek relief against any particular municipal or state actor, and the Commission has issued numerous declaratory rulings, including the declaratory ruling component of the *September 2018 Order*, without making the sorts of targeted findings regarding particular municipalities.[38] The clear "uncertainty" regarding the scope of the rules at issue is sufficient reason for the Commission to "issue a declaratory order to . . . remove" it so all stakeholders have clarity moving forward.[39]

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The Commission should grant the declaratory rulings requested by WIA and CTIA and commence a rulemaking to permit minor compound expansions to facilitate 5G progress. These

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35 47 C.F.R. § 1.2; *see*, *e.g.*, *In re Pinter*, 19 FCC Rcd. 17,385, 17,390-91 (2004) (rejecting this argument as "without merit" in a parallel context).

36 WIA Petition for Rulemaking at 13, RM-11849 (filed Aug. 27, 2019).

37 *See*, *e.g.*, Joint Comments of Cities at 1-3; NATOA et al. Comments at 2.

38 *See*, *e.g.*, *September 2018 Order* at 9,123 ¶ 66 (declining to predict how declaratory ruling "does or does not impact" any particular agreement because the effect would "depend upon all the facts and circumstances of that specific case").

39 5 U.S.C. § 554(e); *see* 47 C.F.R. § 1.2(a).

steps will bring much-needed certainty and uniformity as private actors and municipalities continue to work together to deliver next-generation technologies to all Americans, while preserving local control over important public-safety issues.

Respectfully submitted,

/s/

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